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IN THE

SUPREME COURT OF THE UNITED STATES

——————TERM

No. 290

J. TROSPER WILLIE,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petition of J. Trosper Willie respectfully represents to this Honorable Court:

A

Petitioner was indicted in the United States District Court for the Eastern District of Louisiana, New Orleans Division, the indictment containing 3 counts, each charging your petitioner with having made false statements to

a governmental agency in violation of Title 18, United States Code, Section 1001. That your petitioner was, on June 18, 1953, found "guilty as chraged" by a jury upon his trial on said indictment. That an appeal was taken by petitioner from said verdict, upon the ground that same was contrary to the law and evidence, said appeal being taken to the United States Court of Appeals for the Fifth Circuit. That no written opinion was rendered by the District Court. That under date of June 9, 1954, the United States Court of Appeals for the Fifth Circuit affirmed the judgment of the United States District Court for the Eastern District of Louisiana, New Orleans Division, upon which your petitioner was sentenced to imprisonment for one (1) year on each of the 3 counts of said indictment, the sentences to run concurrently. That there is annexed hereto and made part hereof a duly certified copy of the opinion rendered on appeal by the United States Circuit Court of Appeals for the Fifth Circuit.

B

Your petitioner represents that the verdict of the jury herein was contrary to the law and evidence. That no motions for verdict of acquittal were filed by the defense either at the close of the government's case or at the conclusion of the introduction of all evidence. That the United States Circuit Court of Appeals for the Fifth Circuit refused to carefully study the transcript because such motions for verdict of acquittal had not been filed, even though it was contended by the defense that the evidence was equally as consistent with innocence as with guilt. That such refusal to carefully review the record was in

direct conflict with decisions of other United States Circuit Courts of Appeal, specifically in the cases of *Wright vs. U. S.*, 227 Federal 855, and *Cox vs. U. S.*, 96 Fed 2d 41. That the judgment of the Circuit Court of Appeals which your petitioner seeks to have reviewed was rendered and entered on June 9, 1954. That your petitioner did, within the time prescribed by law, petition the United States Circuit Court of Appeals for the Fifth Circuit for a rehearing of said appeal and that on July 22, 1954 said Circuit Court of Appeals entered an order denying the petition for a rehearing, rendering no opinion in connection with said order. That a duly certified copy of said order denying the petition for a rehearing is annexed hereto and made part hereof. That jurisdiction is conferred upon this Honorable Court to review the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit by Writ of Certiorari, by the provisions of Section 347 of Title 28 of the United States Code.

C

The following questions are presented for review:

1. Whether the United States Circuit Court of Appeals should pass upon the sufficiency of the evidence after a conviction by a jury in a United States District Court when the sufficiency of the evidence has not been questioned in the District Court by the defendant by means of motions for verdict of acquittal.

2. Whether the United States Circuit Court of Appeals is obligated to closely scrutinize the transcript of testimony from the District

Court in order to determine whether the evidence justified a conviction when the sufficiency of the evidence was not questioned in the District Court by means of motions for verdict of acquittal.

3. Whether the evidence upon the trial of your petitioner was not more consistent with innocence than with guilt and whether, therefore, the jury in the United States District Court did not err in returning a verdict of "guilty as charged" as to your petitioner.

D

The only statute which the case at bar involves is Title 18, United States Code, Section 1001, the text of which is as follows:

> "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or represents, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

E

Petitioner was the owner of the Louisiana State College of Mortuary Science, a school at which veterans of World War II were taught the business of embalming and

other aspects of conducting funeral parlors. The students attended this college under the benefits conferred by the G. I. Bill of Rights. Each student was entitled to an allowance of $67.20 for embalming instruments to be used during the course of study and afterwards in the undertaking business. The arrangement was that petitioner, as owner of the school, would furnish each student with $67.20 worth of instruments and then would file with the Veterans Administration, Standard Form 1034a-Rev., listing the students who had received the designated amount of instruments and your petitioner would then be reimbursed by the Veterans Administration for the value of the instruments furnished to the students. It was contended by the government that petitioner filed Standard Form 1034a-Rev. upon three occasions listing students as having received the instruments due to them when as a matter of fact such instruments were not furnished to the students by your petitioner.

F

The case came within the jurisdiction of the United States District Court for the reason that the government contended that your petitioner filed false returns to an agency of the United States Government in violation of Title 18, Section 1001, United States Code.

G

Upon the trial of the case both the government and the defense presented as witnesses former students of the school. There was direct contradiction between the gov-

ernment and the defense witnesses as to whether the instruments had been furnished. The defense introduced in evidence written receipts evidencing the fact that your petitioner had, while the school was in operation, purchased more sets of embalming instruments than there were students enrolled in the school during its entire tenure of operation. The defense also produced as a witness the person who was in charge of the distribution of instruments at the school, who testified positively that instruments were distributed to each of the students whom the government claimed did not receive instruments. Two of the witnesses for the government, who were former students, testified that none of the students in the school received instruments, whereupon the defense produced several ex-students who testified they had received their full sets of instruments, thus destroying the credibility of the government witnesses. It is obvious from the examination of the transcript that the testimony in the case was more consistent with innocence than with guilt.

Counsel for the defendant did not question the sufficiency of the evidence during the trial by the filing of motions for verdicts of acquittal before the case went to the jury. The United States Circuit Court of Appeals for the Fifth Circuit, in its opinion affirming the judgment of the District Court, which opinion is annexed hereto, for the reason that motions for a verdict of acquittal had not been filed, declined to "subject the record to the intensive scrutiny and search which would be required of us if appellant had, as he should have done, tested the evidence below by a motion for a directed verdict."

It has been uniformily held that in order to prevent a miscarriage of justice, the Appellate Court will inquire into the sufficiency of the evidence even though such sufficiency had not been questioned upon the trial of the case. (*Wright vs. U.S.*, 227 Fed. 855; *Cox vs. U.S.*, 96 Fed. 2d 41.)

In *Cox vs. U.S.*, Supra, the following language was used by the Circuit Court of Appeals of the Eighth Circuit:

> " * * * However, where it clearly appears in a criminal case that a defendant has been convicted of an offense which the evidence fails to show was committed, the error of submitting the case to the jury for determination is so plain and vital that this court is at liberty to and will reverse even in the absence of a proper motion and exception, not because the defendant has a right to demand a reversal, but solely in the public interest to guard against injustice."

In view of the fact that the appellate courts have seen fit to examine the evidence and to reverse in cases of clear insufficiency of evidence, it is obviously logical to assume that they must have examined the transcript of the testimony closely in order to determine whether they were justified in passing upon the sufficiency of the evidence.

Considering the above it seems obvious that the decision of the United States Circuit Court of Appeals for the Fifth Circuit is in conflict with the decisions of other United States Circuit Courts of Appeal on this subject.

H

Your petitioner believes that the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit is erroneous, and that this Honorable Court should require the said case to be certified to it for its review and determination, in conformity with the provisions of the Act of Congress in such case made and provided.

Your petitioner therefore prays that a Writ of Certiorari be issued by this Court, directed to the said United States Circuit Court of Appeals for the Fifth Circuit, commanding the said court to certify and send to this Court, on a day certain, a full and complete transcript of the record and all proceedings of the said Circuit Court of Appeals in the case numbered and entitled on its docket, No. 14,642, "J. Trosper Willie, Appellant, vs. United States of America, Appellee," and that the said judgment of the United States Circuit Court of Appeals for the Fifth Circuit may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem just and equitable.

G. Wray Gill
Pere Marquette Building
New Orleans, Louisiana

F. Irvin Dymond
National Bank of Commerce Building
New Orleans, Louisiana

Attorneys for Petitioner

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned authority, there personally came and appeared:

F. IRVIN DYMOND

who, being duly sworn, did depose and say:

That he is one of the counsel for J. Trosper Willie, the petitioner in the foregoing petition for certiorari, that he prepared said petition and that the allegations thereof are true, as he verily believes.

SWORN TO AND SUBSCRIBED
BEFORE ME THIS 9TH DAY
OF AUGUST, 1954.

NOTARY PUBLIC

[fol. 268] OPINION OF THE COURT—Filed June 9, 1954

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14642

J. TROSPER WILLIE, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

(June 9, 1954)

Before Hutcheson, Chief Judge, and Holmes and Borah, Circuit Judges

Per CURIAM:

Charged in an indictment in three counts with having made false statements to a government agency in connection with his operation of the Louisiana State College of Mortuary Science, defendant was found guilty as charged. [fol. 269] Appealing from the judgment sentencing him to the custody of the Attorney General for a period of one year, appellant is here presenting for our consideration a single ground of error.[1]

Conceding that no motion for acquittal was filed or other request for a directed verdict was made on defendant's behalf, and that the rule is that, in the absence of such

[1] "It is not contended by the appellant that any prejudicial errors were committed by the Trial Judge upon the trial of this case. This appeal is based solely upon the contention that the guilt of the accused was not proven beyond a reasonable doubt. That the evidence taken as a whole is more consistent with innocence than with guilt and that the error committed was committed by the jury in returning a verdict of 'guilty as charged' in the absence of sufficient evidence to sustain such a verdict."

motion or request, an assignment of error that the evidence is insufficient to support the verdict and judgment presents nothing for our consideration, appellant urges upon us that this case falls within a recognized exception to the rule. This exception is that where the record plainly shows that there is no evidence at all in support of the record or such a paucity of it as to show a miscarriage of justice, the court will relieve against the judgment of conviction by reversing it and discharging the defendant or at least remanding the cause for trial anew.[2]

The United States, in its turn, conceding that if the record made the showing contended for by appellant, this court could and would, notwithstanding the defendant's failure to move for a verdict, relieve him from the judgment, in-
[fol. 270] sists that the record wholly fails to make out such a case. It, therefore, urges upon us that what appellant is in effect asking us to do here is to ignore the rule established by the cases,[3] and, proceeding as though the requisite motion had been made below, search the record for error, and that this, under settled law, we should not, indeed may not, justly do.

A study of appellant's brief and a reading of the record leaves us in no doubt that it is apparent on the face of the record that there is not presented here such a condition of "unfairness and injustice" as would require us to correct an obvious miscarriage of justice and that we may not be required to, indeed we ought not to, subject the record to the intensive scrutiny and search which would be required of us if appellant had, as he should have done, tested the evidence below by a motion for a directed verdict.

No reversible error appearing, the judgment must be, and it is hereby, affirmed.

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[2] Gillette v. U. S., 236 Fed. 215; Sykes v. U. S., 204 Fed. 909; Wright v. U. S., 227 Fed. 855; Lambert v. U. S., 101 F. (2) 960.

[3] U. S. v. Powell, 155 F. (2) 184; Davenport v. U. S., 197 F. (2) 157; Thacker v. U. S., 155 F. (2) 901; Herman v. U. S., 48 F. (2) 479; Ansley v. U. S., 135 F. (2) 207.

[fols. 271-274] JUDGMENT

Extract from the Minutes of June 9th, 1954.

No. 14642

J. TROSPER WILLIE

versus

UNITED STATES OF AMERICA

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was taken under submission by the Court upon the record and briefs on file;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 275] ORDER DENYING REHEARING

Extract from the Minutes of July 22, 1954.

No. 14642

J. TROSPER WILLIE

versus

UNITED STATES OF AMERICA

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 290

J. TROSPER WILLIE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 268-270, Pet. 10-11) is reported at 213 F. 2d 624.

JURISDICTION

The judgment of the Court of Appeals was entered June 9, 1954 (R. 271-274) and a petition for rehearing was denied on July 22, 1954 (R. 275). The petition for a writ of certiorari was filed on August 17, 1954. The jurisdiction of this Court is

invoked under 28 U.S.C. 1254(1). See also Rule 22(2) of the Rules of this Court.

QUESTION PRESENTED

Whether the evidence is sufficient to support petitioner's conviction.

STATUTE INVOLVED

18 U.S.C. 1001 provides as follows:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Petitioner was found guilty on a three-count indictment returned against him in the United States District Court for the Eastern District of Louisiana which charged him with willfully making false statements to the Veterans Administration, in violation of 18 U.S.C. 1001 (R. 1-6, 259). He was sentenced to concurrent terms of imprisonment for one year on each count (R. 261).

The evidence for the Government may be summarized as follows:

Petitioner was the owner and operator of the Louisiana State College of Mortuary Science, an embalming school which veterans of World War II attended under the benefits conferred by the G.I. Bill of Rights. Under his contract with the Veterans Administration, petitioner was to provide each student with certain itemized instruments valued at $67.20 which were to be furnished outright to each student. Petitioner was to be reimbursed for the cost of these instruments upon his presentation of a voucher that the instruments were so furnished (R. 15-16, 18-19). At different times, petitioner submitted vouchers and received reimbursement for instruments which he represented as having been furnished to four students named in the indictment, *i.e.*, Margaret E. Landrum, John T. Verrett, Kenneth Chandler and Steadman P. Barquet, Sr. (R. 21-22).

Each of these four students, as well as Zannie Brazeley who was also named in the indictment, testified that they had not, at any time during their course of study or afterwards, received the instruments despite repeated requests therefor (R. 25, 28-29, 58, 59, 85, 88, 104-105, 116). Two students, Landrum and Verrett, testified that they signed receipts for the instruments upon petitioner's representation that he could not get the instruments for them until the receipts were signed (R. 24-27, 58-59). Brazeley signed such a receipt but only after petitioner gave him a promissory note for $68, the approximate value of the instruments (R. 85-

86). Chandler and Barquet did not sign such receipts (R. 104-105, 116).

Petitioner offered the testimony of a student to the effect that such student had issued instruments to the students named in the indictment (R. 127-131) and testimony of another student that he knew the persons named in the indictment to have received instruments (R. 157), although he had not seen them issued (R. 160). Petitioner himself testified that he had receipts for the instruments from all students named in the indictment but could not find them at the time of trial (R. 211, 219); that he signed the note to Brazeley just to keep peace (R. 212); that he had bought 155 sets of instruments and paid for them in cash (R. 213-215, 234-236, 245-247). The total enrollment in petitioner's school during its operation was 180 (R. 233-234).

No motion for acquittal or a directed verdict was made. The court charged the jury that if they found that any of the veterans named in the indictment received the instruments, petitioner could not be convicted on such charge; and that, even if they found that the veterans did not receive the instruments, petitioner could not be convicted unless the jury also found that petitioner knew that they had not received the instruments (R. 256).

On appeal, the Court of Appeals held that, while it had power to consider a claim of insufficiency of the evidence despite the absence of motion for acquittal, there was presented by the record no such "unfairness and injustice" as would require it to

"subject the record to the intensive scrutiny and search which would be required of us if appellant had, as he should have done, tested the evidence below by a motion for a directed verdict" (Pet. 11).

ARGUMENT

The Court of Appeals recognized the principles enunciated in the cases which petitioner cites (Pet. 7) to the effect that, in order to prevent a miscarriage of justice, an appellate court will inquire into the sufficiency of the evidence even though such sufficiency had not been questioned upon the trial of the case. The court merely found that this was not such a case and that no miscarriage of justice resulted.

It is evident from the Statement, *supra,* that the government presented more than sufficient evidence to sustain the verdict. The issue became largely one of the credibility of the government's witnesses against petitioner's witnesses. Such an issue was one for the jury to resolve.

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
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BEATRICE ROSENBERG,
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SEPTEMBER 1954.

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